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Dispute Resolution
Case Law Update
Rosling King LLP

Background

Ms Rafaela Evans ("**the Claimant**") was a former client of Pinsent Masons LLP ("**the Defendant**"). The Claimant applied for permission to appeal a decision of a costs judge who dismissed her application for an assessment of the Defendant's legal costs. The Claimant's application was considered on the papers by Jay J on 13 May 2019. The Order of Jay J, dismissing the application for permission to appeal, was received by the Claimant's solicitors, Silver Shemmings Ash, on 21 May 2019. Within 7 days of receipt of the Order, the Claimant could apply for a hearing to renew the application for permission to appeal ("**the Application**"). The deadline for renewing the application expired on 28 May 2019.

On 30 May 2019, the Claimant's solicitors wrote to the Court stating that they understood that that day was the final day to request for an oral hearing, taking into account the Bank Holiday on 27 May 2019 ("**May Letter**"). On 3 June 2019, the Claimant's solicitors received the notice listing the Application for hearing, and proceeded to send the notice and their letter of 30 May 2019 to the Defendant. The following day, the Defendant wrote to the Court asserting that the Claimant's Application on 30 May was made out of time and thus invalid. Pursuant to Civil Procedure Rule rule 2.8(4), a Bank Holiday is only excluded from the time computations where the relevant period is five days or less. Therefore, CPR rule 2.8(4) did not apply in this instance, meaning the Claimant's Application was in fact two days late.

The Claimant applied for relief from sanctions on 6 June 2019 and a retrospective extension of two days to apply for oral permission to appeal. The Claimant's solicitors submitted, by witness statement, that as soon as the two-day delay was brought to their attention, they wrote to the Court requesting an oral hearing ("**June Witness Statement**"). On 11 June 2019, Nicol J granted relief on the grounds the request for extension was very short, it would not disrupt the litigation, and the default was not serious or significant.

The Defendant appealed Nicol J's decision on 17 June 2019. As part of its appeal, the Defendant drew attention to the inconsistency between the evidence supporting the May Letter and the June Witness Statement. The Defendant submitted that the Court had been seriously misled on the basis of the inconsistencies between the May Letter and the June Witness Statement. The Claimant argued there had no intention to mislead the Court, and at the time of May Letter, her solicitors had a genuine belief that the application remained in time.

The Decision

The High Court overturned Nicol J's decision, allowing the Defendant's appeal and refusing the Claimant's application for relief from sanctions. The Judge took the view that the Claimant's solicitors had misled the Court by suggesting the Claimant's application was in time when they knew perfectly well it was out of time. The Claimant's solicitors admitted to the Judge they had provided incorrect information in the June Witness Statement and had not calculated the relevant dates correctly. The Judge concluded that the Claimant's solicitors failed to explain how taking the Bank Holiday into account successfully got them to 30 May 2019. As per CPR rule 2.8(4), bank holidays were not excluded in this case, where the specified period was seven days; and, in any event, this did not explain the two-day delay because even if the Bank Holiday had not been, the Application still remained a day out of time.

The Judge found no adequate explanation for why the Court had been seriously misled by the June Witness Statement. The Judge was further concerned with the possibility that the Claimant's solicitors knew perfectly well on 30 May that the Application was two days out of time, but hoped to pull the wool over the Court's eyes by asserting that the Application was on time. The Judge found no justification for why the Claimant's solicitors wrote a misleading letter to the Court and put forward false statements in witness evidence.

The Judge found the matter was seriously compounded by the Claimant's solicitor's failure to serve the May Letter on the Defendant, at the same time it was sent to Court. Pursuant to Practice Direction 52 paragraph 7.4, the Claimant was required to serve the May Letter on the Defendant, and had it done so, the Defendant would have had the opportunity to make representations that the Application was out of time and that an oral hearing should not be listed until a relief application had been made. The Judge concluded that had Nicol J been fully aware of the position, he would have exercised his discretion to refuse relief from sanctions.

Commentary

The High Court's decision sends a message to legal practitioners to ensure familiarity with the CPR in calculating relevant time periods. The Court also reiterated the importance of seeking relief from sanctions at the earliest opportunity in proceedings. It is well accepted that where an application for relief from sanction is made, the Court will consider not only the relevant period of delay but also, whether the solicitors concerned reacted promptly once the need for relief was apparent. The Judge was critical of the Claimant's solicitor's assertion, that they had acted promptly in requesting a hearing once the delay was apparent, which they subsequently acknowledged was untrue.

This decision also serves as a reminder for solicitors to always consider, at every stage of litigation, their overriding duties to the Court, and in particular the fundamental duty not to mislead the Court, whether knowingly or recklessly. Spencer J in his judgment highlighted the need for absolute clarity and accuracy in both evidence put before, and correspondence with, the Court.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.